for damages in respect of the defendant's overstay at the site since the expiry of the notice to quit, with any particular favour." I have read through the record and I see that no evidence was led by the plaintiffs on the question of damages. I am of the view, however, that damages should be awarded to the plaintiffs at the rate of $40 p.m. from 1st May, 1963, until the plaintiffs recover possession.

Wee Chong Jin C.J. and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *J. Tan Chor Yong & Co.; Ironside & de Souza.*

BATA SHOE COMPANY (MALAYA) LTD. v. EMPLOYEES PROVIDENT FUND BOARD

[O.C.J. (Gill J.) September 30, 1966]

[K.L. — Civil Suit No. 1 of 1965]

Provident Fund — Meaning of "employee" — Shop manager appointed by company — Scope of ostensible authority — Whether employees employed by a shop manager are employees of the company — Employees Provident Fund Ordinance, 1951, s. 2.

Master and Servant — Shop manager appointed by company — Shop manager appointing salesmen to assist him — Whether salesmen employees of company — "Contract of service" and "contract for service."

The plaintiff company sought a declaration that salesmen employed by their shop managers were not their employees for the purposes of the Employees Provident Fund Ordinance. It appeared that the shop managers were employed by the company under written agreements which gave a shop manager power to employ salesmen, salesgirls, clerks and servants and which provided that the shop manager was to be the employer of such salesmen, salesgirls, clerks and servants.

Held: (1) in view of the considerable control which the company had over the shop managers the shop managers were the employees of the company;

(2) in the light of all the evidence in this case the shop managers could not be said to be acting as the agents of the company when they recruited their own salesmen to assist them and therefore, there was no relationship of employer and employee within the meaning of the Employees Provident Fund Ordinance, between the plaintiff company and the salesmen employed by its shop managers.

Cases referred to:—

(1) *Short* v. *J. & W. Henderson Ltd.* (1946), 174 L.T. 417, 427.

(2) *Park* v. *Wilsons and Clyde Coal Co. Ltd.* [1928] S.C. 121, 134.

(3) *Stevenson Jordan and Harrison Ltd.* v. *MacDonald and Evans* [1952] 1 T.L.R. 101, 111.

(4) *Pauley* v. *Kenaldo* [1953] 1 All E.R. 226.

(5) *Richardson* v. *Cartwright* (1844), 174 E.R. 833.

(6) *Edmonds* v. *Bushell & Jones* (1865), L.R. 1 Q.B. 97.

(7) *Smith* v. *M'Guire* (1858), 157 E.R. 589.

(8) *Watteau* v. *Fenwick* [1893] 1 Q.B. 346.

(9) *Daun* v. *Simmins* (1879), 41 N.S.L.T. 783.

CIVIL SUIT.

M. Shankar for the plaintiff.

Cheng Tim Pin for the defendant.

Cur. Adv. Vult.

Gill J.: The plaintiff company is a manufacturer of footwear and incidental goods which it sells in its retail shops throughout Malaya. Such of its shops is under the charge and general control of a "shop manager" who is appointed under a standard written agreement. Clause 9 of the agreement provides as follows:

> "To assist him in the conduct of the business, he may employ any salesmen, salesgirls, clerks or servants and may agree with such persons the terms and the rates of remuneration for his/her services provided they comply with the requirements of the laws of the country and further provided that it is understood and agreed upon that he is the employer of such salesmen, salesgirls, clerks or servants."

Clause 4 of the agreement provides that as remuneration for his services the shop manager shall be entitled to a commission at the rate of 7 to 9 per cent on the amount received by the shop in respect of the sale of boots, shoes and all other goods whatsoever, and clause 7 requires him at all times to keep or cause to be kept in proper books all usual accounts of all receipts, payments, transactions and dealings in the course of the business of the shop and to submit fortnightly statements of such accounts and remit all monies received by him to the company. Clause 5 of the agreement says that he shall be solely responsible for and shall discharge all recurring charges and expenses whatsoever incurred in carrying on the shop, including wages, salaries and certain other specified charges.

The defendant contends that all salesmen, salesgirls, clerks or servants (to whom I shall hereinafter refer collectively as "the salesmen") employed in the plaintiff's retail shops are employees of the plaintiff within the meaning of the Employees Provident Fund Ordinance, 1951, and that consequently the plaintiff is liable to make contributions under the Ordinance in respect of such salesmen.

The plaintiff has paid the defendant a sum of $83,552 by way of Employees Provident Fund contributions in respect of such salesmen without prejudice to the contention that it is not legally liable so to do and on the basis that the said payment will be refunded in the event of it being judicially decided that there is in fact no such liability.

This suit has been brought for a declaration that the salesmen employed by the shop managers are not the "employees" of the plaintiff, nor is the plaintiff their "employer" within the meaning of the Ordinance, and that consequently the plaintiff is and at all material times has been under no liability to make contributions to the

defendant in respect of such salesmen. The plaintiff is also seeking an order that an account be taken of all sums received by the defendant from the plaintiff by way of alleged contributions in respect of such salesmen and that the defendant do pay to the plaintiff the amount found due upon taking of such an account with interest thereon at such rate as may be agreed between the parties or as may be deemed just.

The facts of the case as contained in the evidence of the three witnesses called by the plaintiff are not in dispute. They are as follows. Once a shop manager is appointed he appoints his own salesmen, as provided in the written agreement relating to his own employment, without any directions from or consultations with the company. He has absolute discretion as regards the number of employees to be appointed. He furnishes no information about any of his salesmen to the company, so that no records are kept by the company in respect of such salesmen. He fixes the wages to be paid to each of his salesmen, and under the terms of his agreement with the company he and he alone is liable to pay such wages. He decides about the bonus and other benefits to be paid to each of his employees without informing or consulting the company. In short, he and he alone fixes the terms and conditions of service of his employees. He pays the pay roll tax on the salaries of his employees, and there have been cases where he has paid contributions under the Employees Provident Fund Ordinance, 1951. The company is under no obligation to pay the shop manager any remuneration other than his commission under the agreement, although, notwithstanding the agreement, all shop managers make claims for certain expenses incurred in the running of the shop, which are met wholly or in part by the company. The company has at no time contributed towards the salaries payable to the salesmen employed in the shops.

The company has the power to transfer a shop manager from one shop to another, and there have been cases where this power has been exercised, but it has no power to transfer salesmen from one shop to another. When a shop manager is transferred, it is common practice for him to terminate the services of his salesmen prior to his transfer to a new shop, although there have been cases where he has kept in his employment some of his salesmen who were willing to go with him to his new shop. He is under no obligation to keep in employment the existing salesmen in the shop to which he is transferred, although of course he may choose to take them on as his own employees. The shops are visited by officers of the company from time to time, but they have no power to give any instructions to the salesmen, as their dealings are with the shop manager who alone is responsible to them. The agreement under which a shop manager is appointed gives the company the power to require him to dismiss any of his salesmen, but in practice this power has never been exercised. In the usual case the shop manager himself terminates the services of his salesmen. The company's sanction or permission for this is not sought. The company is not even informed about it. If a shop manager wishes to pay wages in lieu of notice to dismiss, he pays out of his own pocket.

The three witnesses for the plaintiff, who are at present the employees of the company, were at one time employed as salesmen in the company's shops. Each one of them has given evidence to say that when he was so employed he regarded himself as an employee of the shop manager and not of the company.

The sole question to be decided in this case is whether there is a relationship of employer and employee between the plaintiff company and the salesmen employed by the shop managers to assist them in carrying on the business in the company's retail shops. An "employee" is defined under section 2 of the Employees Provident Fund Ordinance, 1951, as "any person . . . who . . . is employed under a contract of service . . . to work for an employer." The word "employer" is defined in the same section as a "person with whom an employee has entered into a contract of service and includes (a) the manager, agent or person responsible for the payment of salaries or wages to an employee."

A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope and the duty of the undertaking. Whether or not a particular contract is a contract of service is a question of fact, depending upon the terms of the engagement, the method of remuneration, and the power of controlling and dismissing the workmen, although none of these factors is by itself conclusive. (See *Halsbury*, 3rd edition, volume 25, page 448, paragraph 872).

In *Short* v. *J. and W. Henderson, Ltd.*[1] Lord Thankerton recapitulated with approval the four *indicia* of a contract of service derived by Lord Justice Clerk in *Park* v. *Wilsons and Clyde Coal Co., Ltd.*[2] from the authorities referred to by him. These are: (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the doing of the work; and (d) the master's right of suspension or dismissal. Lord Justice Clerk had gone on to say that a contract of service may still exist if some of these elements are absent altogether, or present only in an unusual form, and that the principal requirement of a contract of service is the right of the master in some reasonable sense to control

the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship.

It is to be observed that the relationship of master and servant is characterized by a contract of service, express or implied, between the master and the servant. A contract of service is to be distinguished from a contract for services because a person who contracts to provide services for another person is not a servant but an independent contractor. To distinguish between an independent contractor and a servant, the generally accepted test is whether the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work. In *Stevenson Jordan & Harrison, Ltd.* v. *MacDonald & Evans* [3] Lord Justice Denning said:—

> "One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

In the present case, by virtue of clause 3 of the agreement the company has considerable control over its shop managers. The only fact which seems to suggest that the manager is an independent contractor is that he is not paid a salary but a commission and that it is he and not the company who has to pay certain expenses incurred in the running of the shop, including the wages of the retail staff. However, a servant may be paid his remuneration by way of commission rather than by way of a fixed salary (see *Pauley* v. *Kenaldo, Ltd.*[4]). Payment by the manager of expenses, including wages of salesmen employed by him, out of the commission which he gets from the company under the agreement, does not necessarily constitute him an independent contractor. It is all a matter of arrangement for the sake of convenience and expediency, so that in effect the manager's remuneration boils down to what is left over after he has paid out all such expenses out of his commission. Taking all the facts into consideration, I am of the opinion that the shop manager is a servant of the company and is in fact so regarded by the company by reason of the amount of control which the company exercises over him.

Turning now to the question of the relationship between the company and the salesmen, the company as such does not select such salesmen for appointment. Their wages are not paid by the company. The company has no direct control over the manner in which the work is to be performed by the salesmen. It has only an indirect control over their suspension or dismissal by reason of the right which it retains under the agreement to require a manager to dismiss any of the salesmen engaged by him. Ultimately, this right of suspension or dismissal is exercised by the manager. The evidence is that the company has never had to require any of its shop managers to dismiss any of their salesmen.

It is open to a shop manager to run the shop under his control without any salesmen, because he is under no obligation under his agreement with the company to employ anybody to assist him. It is conceivable that he may run his shop with the assistance of such members of his family as are not otherwise employed without paying them any wages. There is no restriction against his having part-time salesmen. On the other hand, he is at liberty to employ such number of salesmen as he may consider necessary in the light of the size of sales in his shop. Such salesmen can only look to him for payment. His main responsibility is to render to his employer an account of the sales made in the shop and the amount of money collected. The company exercises no control over the hours of work or the periods of absence from the shop of the salesmen employed by the manager.

The company has no power to issue any direct orders to such salesmen over the head of the shop manager. The company reserves the power to transfer a shop manager from one shop to another, but there is no such power as regards salesmen. It has been contended on behalf of the defendant that all this is a matter of arrangement and expediency. Nonetheless, it is an arrangement which absolves the company from any liability to pay the wages of such salesmen. The world at large may look upon such salesmen as employees of the company by reason of the fact that they work in the company's shop, but what the world thinks is by no means decisive of the relationship between the company and such salesmen.

The chief argument in support of the defendant's contention that the salesmen are servants of the company is that whatever control the company has is exercised by and through the manager acting as a servant of the company. The question, however, is whether a shop manager is the company's agent in regard to to anything he does in the course of his duties as manager of the company's shop.

The general rule is that where the servant, whilst acting in the ordinary course of his employment on his master's behalf, makes a contract which falls within the apparent scope of his authority, the master cannot escape liability on the ground that he did not authorize the making of the contract (*Richardson* v. *Cartwright* [5]) nor even on the ground that he forbade his servant to make it (*Edmonds* v. *Bushell and Jones* [6]) or that the servant as agent exceeded his instructions (*Smith* v.

M'Guire (7)). All persons dealing with the servant are entitled to assume, unless they have notice to the contrary, that he possesses the authority which it is usual for a servant in his position to possess (*Watteau* v. *Fenwick* (8)).

The "ostensible authority" or holding-out principle is in reality a species of estoppel whereby, even though there is in fact no contract between the principal and the third party suing him, the principal is precluded from contending as against the third party that the agent contracted without his authority. A notional contract is thus implied in law as between the principal through his agent and the third party in order to fix the principal with liability. If the third party knows that the agent is contracting on his own behalf and not on behalf of his principal, no such notional contract can or will be implied (*Daun* v. *Simmins* (9)).

In the present case the evidence is that each salesman is informed, and he knows, that the shop manager is employing him on his own behalf and not acting as a servant or agent of the company. Therefore no notional contract can be implied as between the company and the salesmen. To my mind, the employment by a servant of another servant for his master cannot be regarded as something which falls within the apparent scope of the servant's authority. The apparent scope of the shop manager's authority is to sell footwear for his principal or master, the company. Therefore any contract which he makes for the sale of such footwear with a third party would be within the apparent scope of his authority, as distinguished from any contract with a third party to help him in the sale of footwear, which cannot be said to be a contract within his apparent scope of authority. Again, if the shop manager enters into a contract with a third party for the decoration of his shop for a Christmas sale, the third party is entitled to assume that this is a contract which the shop manager is making on behalf of his principal within the scope of his general authority even though it may be that he is forbidden by his principal to enter into any such contract.

Notwithstanding the fact that the shop manager may be regarded as the agent of the company for diverse purposes under the terms of his employment under the written agreement, he cannot be regarded as an agent of the company for all purposes. In the light of all the evidence in this case, he cannot be said to be acting as an agent of the company when he recruits his own salesmen to assist him. The work which such salesmen do is undoubtedly an integral part of the plaintiff's business but that fact alone, in the absence of the basic *indicia* of the relationship of master and servant, is insufficient to make them the servants of the company. Moreover, their work may equally be said to be an integral part of the shop manager's business in the sense that he has certain proprietary rights in the money realized by the sale of the goods in the shop.

For the reasons I have stated and on the facts of this case I have come to the conclusion that there is no relationship of employer and employee within the meaning of the Employees Provident Fund Ordinance, 1951 between the plaintiff company and the salesmen employed by its shop managers. It is to be observed that section 2 of the Employees Provident Fund Ordinance, 1951 defines an employer to include the manager, agent or person responsible for the payment of salaries or wages to an employee. I think on the basis of that definition alone the plaintiff is entitled to the declaration asked for. There will therefore be a declaration accordingly. I will also make the consequential orders asked for, although the evidence is that the amount which the plaintiff has been called upon to pay is known so that it is merely a question of the plaintiff getting back that money with a reasonable rate of interest thereon which I fix at 4½ per cent per annum. The defendant must pay the costs of the action.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.; Shook Lin & Bok.*

TAN CHONG AND SONS MOTOR COMPANY LTD. v. YANG CHIN LANG

[O.C.J. (Gill J.) September 30, 1966]

[K.L. — Civil Suit No. 939 of 1965]

Contract — Guarantee — Contradiction — Admissibility of oral evidence — Evidence Ordinance, 1950, s. 92 Provisoes (b) and (f).

In this case the plaintiffs sued the defendant on a letter of guarantee. The facts were that one Yang Pin Joo was appointed the agent and authorized dealer of the plaintiffs, who were the sole distributors of certain Japanese cars. Credit facilities were given to Yang Pin Joo but he became heavily indebted to the plaintiffs. The plaintiffs threatened to cancel his agency and to sue him to recover the debts unless he found a guarantor. Yang Pin Joo then spoke to his father the defendant and the father agreed to guarantee Yang Pin Joo's account to the extent of $100,000. Later the defendant signed a letter of guarantee and it was on this that he was sued, as Yang Pin Joo failed to clear his debts. Evidence was given at the trial of the threat to cancel the agency and to sue. It was contended for the defendant that such evidence was inadmissible as no evidence could be given to add to, contradict or vary the contents of the letter of guarantee.

Held: (1) when there is a contemporaneous or prior separate oral agreement as to a matter on which a document is silent, proof of it may be given when such agreement is not inconsistent with or does not contradict the terms of the document and the evidence was admissible under provisoes (b) and (f) to section 92 of the Evidence Ordinance, 1950;